11-14-2001

Fifth Place: John Ashcroft, et al. v. Free Speech Coalition, et al.

Kandice Auman

Anne Davies

FIFTH PLACE

No. 00-795

In The

SUPREME COURT OF THE UNITED STATES

Fall Term of 2001

John Ashcroft, Attorney General, et al.,
Petitioner,

v.

The Free Speech Coalition, et al.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

November 14, 2001
Round #3: 7:45 P.M.

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err by concluding that the Child Pornography Prevention Act of 1996 is content-based, rather than content-neutral, based upon its secondary effects to prevent the abuse of children and the proliferation of the child pornography market?

2. If the Child Pornography Prevention Act of 1996 is held to be content-based, is the statute narrowly tailored to serve the compelling government interest in safeguarding the physical and psychological well-being of children and the termination of the child pornography market, under a strict scrutiny standard?

3. Did the Ninth Circuit err by holding that the Child Pornography Prevention Act of 1996 is overbroad, while the material covered by the statute will largely include sexually explicit images of pre-pubescent children, and that any overbreadth can be cured on a case-by-case basis?

4. Did the Ninth Circuit err by holding that the Child Pornography Prevention Act of 1996 is void for vagueness even though it gives a person of reasonable intelligence adequate notice and enforcement is based on objective standards?

5. Should First Amendment protection extend to virtual child pornography, which is an obscene form of speech that has no social value?

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioners, the Attorney General of the United States, respectfully submit this brief and request that this Court REVERSE the judgment of the United States Court of Appeals for the Ninth Circuit that the language "appears to be a minor" and the language "conveys the impression" is unconstitutional and should be severed from the statute.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 198 F.3d 1083 (9th Cir. 1999).

STANDARD OF REVIEW

This Court reviews questions of law de novo. Elder v. Holloway, 510 U.S. 510, 516 (1994).

STATEMENT OF THE CASE

Preliminary Statement

On January 27, 1997, The Free Speech Coalition on its own behalf and on the behalf of its members, Bold Type, Inc., Jim Gingerich and Ron Raffaelli ("The Free Speech Coalition"), filed a complaint in the United States District Court for the Northern District of California, for declaratory and injunctive relief against the Child Pornography Protection Act of 1996 ("CPPA"). (J.A. 1.) The Free Speech Coalition is a trade association that represents more than 600 businesses and individuals involved in the production, distribution, sale and presentation of adult oriented materials. (J.A. 3.) Bold Type, Inc. is a publisher of a book entitled "California's Nude Beaches," a publication "dedicated to the education and expression of the ideals and philosophy associated with nudism." (J.A. 3.) Jim Gingerich is a New York artist whose paintings include large-scale nudes; and Ron Raffaelli is a professional photographer specializing in erotic photography. (J.A. 3.)

The Respondents filed suit in the Northern District of California asserting a pre-enforcement challenge to the constitutionality of certain provisions of the Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2252A, 2256. (J.A. 70.) The Free Speech Coalition alleged that these provisions were vague, overbroad and constituted impermissible content-specific regulations and prior restraints on free speech. (J.A. 70.) Both parties, then moved for summary judgment. (J.A. 70.) However, on August 12, 1997, the district court granted the government's motion for summary judgment, determining that the Act was consistent with the

First Amendment. (J.A. 85.) The district court held that the CPPA was content-neutral and not content-specific and therefore did not intend to regulate speech because of government disagreement with the message being conveyed. (J.A. 76.) The CPPA was instead passed to prevent the secondary effects of the child pornography industry, including the "exploitation and degradation of children and the encouragement of pedophilia and molestation of children." (J.A. 76.) The court also found that the CPPA was not vague or overbroad, and did not constitute an improper prior restraint on speech. (J.A. 81-84.) Finally, the district court also found that the CPPA's affirmative defense did not impermissibly shift the burden of proof to a defendant by virtue of an unconstitutional presumption. (J.A. 83.) The district court, therefore, denied the Free Speech Coalition's cross motion for summary judgment. (J.A. 85.)

On August 13, 1997, the Free Speech Coalition, appealed to the United States Court of Appeals for the Ninth Circuit from this final judgment. (J.A. 87.) The Ninth Circuit affirmed in part on the questions of standing and prior restraint. (J.A. 10.) The judgment was reversed on the questions of unconstitutionality of the statutory language "appears to be a minor" and "conveys the impression". (J.A. 10.) The case was therefore remanded to the district court on December 17, 1999. (J.A. 10.) The Petitioner then filed a Petition for Writ of Certiorari to the United States Supreme Court on November 16, 2000. (J.A. 114.) This Court granted certiorari on January 22, 2001. (J.A. 114.)

Statement of the Facts

For more than two decades, Congress has enacted and amended legislation designed to eliminate the scourge of child pornography by prohibiting the possession, production and distribution of materials depicting children in a sexually explicit manner. (J.A. 49.) The history of this effort, however, had been plagued with examples of child pornographers finding

loopholes within the legislation so that they would not be prosecuted. (J.A. 49.) To close these loopholes, the original federal legislation has been amended many times since it was enacted as the Protection of Children Against Sexual Exploitation Act of 1977. The Free Speech Coalition, et al. v. Reno, et al., 198 F.3d 1083, 1087 (9th Cir. 1999). The original act was passed to criminalize the production of child pornography. Yet, the legislation had many problems, considering that only one person was ever convicted under the Act's production prohibition. Id.

Congress subsequently passed the Child Protection Act of 1984, which expanded the 1977 Act. Id. at 1088. The expansion was a consequence of the 1977 Act's deficiencies and as a response to the Supreme Court ruling in New York v. Ferber 458 U.S. 747 (1982). The Supreme Court held in this case that child pornography would not have to meet the Miller obscenity standard to be prohibited. Id. at 747. Essentially, the Court decided that the compelling interest in protecting children would almost always outweigh First Amendment interests, thereby justifying a categorical denial of First Amendment protection to child pornography in most cases. Id. at 748.

Therefore, the 1984 amendment codified the Ferber rule that child pornography need not meet the obscenity standard. The Free Speech Coalition, 198 F.3d at 1087. The Child Protection Act also raised the age limit for protecting children involved from sixteen years to eighteen years. Id. The 1984 statute also did away with the requirement that the material have to be for the purpose of sale. The Free Speech Coalition, 198 F.3d at 1087. Finally, the act imposed Ferber's "visual depiction" language, thereby greatly extending the reach of the anti-child pornography statute. Id. In the 1980s, Congress made two additional amendments to the statute that further extended its reach to the advertisement of child pornography and the use of computer technology for the transportation of child pornography. Id.

The 1990s brought some of the most significant strides in the crusade against child pornography. The Free Speech Coalition, 198 F.3d at 1087. Following the Supreme Court's landmark decision in Osborne v. Ohio, Congress further toughened the statute, making the possession of three or more pieces of child pornography a federal crime in the Child Protection Restoration and Penalties Enhancement Act of 1990. Id. The principal holding in Osborne v. Ohio sustained a state statute banning even possession or viewing of child pornography on the basis of the state's compelling interest in maintaining the physical and emotional safety of children, and ultimately eradicating the child pornography market. 496 U.S. 103, 110 (1990). There were more changes to the statute in 1994, including punishment for the production and importation of sexually explicit depictions of a minor and restitution for victims. The Free Speech Coalition, 198 F.3d at 1088-89.

Legislation has therefore tracked Supreme Court decisions and the swift development of technology and its infinite possibilities. Id. In recent years, computer technology has given yet another loophole to pornographers so that they may create synthetic child pornography that is virtually indistinguishable from real child pornography. (J.A. 49.) Congress considered extensive testimony and documents and found that there is a link between computer-generated child pornography, of such quality that it is indistinguishable from a depiction of an actual child, and harm to children. (J.A. 71.) Therefore, on September 30, 1996, the Child Pornography Prevention Act of 1996 ("CPPA"), was enacted to address the Government's ongoing fight against child pornography. (J.A. 70.) This Act amends Title 18, Chapter 110 of the United States Code by adding section 2252A. (J.A. 26.) The Act also revised section 2251, 2252, and 2256. Congress passed this legislation, because it recognized that the danger of child pornography is not limited to the effects on children actually used in the pornography. (J.A. 71.)

SUMMARY OF ARGUMENT

This Court should reverse the decision of the Court of Appeals for the Ninth Circuit because the Child Pornography Prevention Act of 1996 does not violate the First Amendment of the United States Constitution. The CPPA is content-neutral and does not violate judicial standards of overbreadth and vagueness. The CPPA constitutes a content-neutral statute because it is designed to prevent the secondary effects of child pornography on children. The CPPA advances substantial government interests in aiming to safeguard the physical and psychological well-being of children. Moreover, despite the CPPA's regulation of child pornography, the CPPA reasonably permits alternative avenues of communication.

Even if the CPPA is content-based, compelling government interests justify the act under a standard of strict scrutiny. Consequently, the CPPA is narrowly tailored in the least restrictive means possible to advance compelling government interests. In addition, this Court has never held that the government's interest in regulating child pornography is limited to visual depictions of real children engaged in sexually explicit conduct. Thus, the Ninth Circuit's decision stands in stark contrast to the decisions holding the CPPA constitutional from the First, Fourth, Fifth and Eleventh Circuits.

The prevention of the sexual exploitation of children, resulting from child pornography, constitutes a substantial and compelling government interest. The Ninth Circuit erred by holding that compelling and substantial government interests exist only when child pornography contains images of actual children. Furthermore, the Ninth Circuit failed to give proper deference to Congressional findings. In adopting the CPPA, Congress aims to regulate visual depictions of children engaging in sexually explicit conduct virtually indistinguishable from pornography depicting real children in sexually explicit conduct.

The CPPA is not substantially overbroad in light of the statute's plainly legitimate sweep. The "appears to be" and "conveys the impression" language of the CPPA is narrowly aimed at regulating images that are virtually indistinguishable to unsuspecting viewers from photographs of actual children engaged in identical sexual conduct. In light of the CPPA's legitimate aim in regulating real and virtual child pornography, the possibility of educational, medical or artistic works falling within the statute's reach is minimal as these circumstances will be cured by a case-by-case analysis. In fact, the affirmative defense and scienter requirement of the CPPA illustrate Congress's intention to narrowly regulate only the images indistinguishable from images depicting actual children.

The CPPA is not void under the First Amendment because of vagueness. Not only does the CPPA provide adequate notice, it provides for objective enforcement by law enforcement. The CPPA defines the criminal offense with sufficient definiteness in that an ordinary person can understand what conduct is prohibited. Additionally, the CPPA does not encourage arbitrary or discriminatory enforcement because an objective standard will be applied in determining whether visual depictions violate the CPPA. Moreover, the scienter requirement and the affirmative defense provide protections against arbitrary enforcement by authorities. Consequently, this Court should find the CPPA constitutional under the First Amendment in recognizing that the sexual exploitation of children is a real threat to the well-being of America's children.

ARGUMENT

I. THE CHILD PORNOGRAPHY PREVENTION ACT OF 1996 IS CONTENT-NEUTRAL BECAUSE IT ADVANCES SUBSTANTIAL GOVERNMENT INTERESTS WITHOUT UNREASONABLY LIMITTING ALTERNATIVE AVENUES OF COMMUNICATION.

The Child Pornography Prevention Act of 1996 expands the government's efforts in combating the use of computer technology to produce child pornography containing images virtually indistinguishable from real children. Specifically, 18 U.S.C. section 2256(8)(B) bans visual depictions that appear to be minors engaged in sexually explicit conduct; and section 2256(8)(D) bans visual depictions advertised, promoted, presented, described or distributed in such a manner that conveys the impression that the materials contain sexually explicit images of children. Accordingly, a federal statute that regulates child pornography must pass constitutional muster under the guidelines enunciated by the Supreme Court. That inquiry requires a determination of whether this regul·tion is content-neutral or content-based. As a content-neutral regulation, the CPPA passes constitutional bars.

A. The CPPA Is Content-Neutral Because It Is Designed To Prevent The Secondary Effects Of Child Pornography On Children.

A federal regulation that serves purposes unrelated to the content of expression is content-neutral despite any incidental effects on speakers and messages. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Accordingly, the principal inquiry focuses on whether the government adopted a regulation of speech because of disagreement with the message it conveys. Id. "The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and

that they leave open ample alternative channels for communication of the information." Ward, 491 U.S. at 791.

This Court upheld the constitutionality of an ordinance aimed at preventing the secondary effects associated with sexually explicit material in City of Renton, et al. v. Playtime Theatres, Inc., et al., 475 U.S. 41, 54 (1986). In Renton, a zoning ordinance prohibited adult motion picture theatres from locating within 1,000 feet of any residential zone including family dwelling, church, park or school. Id. at 43. Reversing the decision of the Ninth Circuit, this Court held that the ordinance was not aimed at the content of the films shown at the theatres but at the secondary effects of such theaters in preventing crime, protecting the quality of the city's neighborhoods and preserving the quality of urban life. Id. at 47-48. Moreover, this Court upheld the constitutionality of a similar city zoning ordinance regulating the location of adult motion picture theatres in Young, et al. v. American Mini Theatres, Inc., et al., 427 U.S. 50, 71-72 (1976). This Court held that zoning ordinances designed to prevent the secondary effects of a business catering in sexually explicit materials constitute a content-neutral regulation. Id. at 63.

Here, this Court should conclude that the CPPA constitutes a content-neutral regulation because Congress is regulating sexually explicit material in order to combat secondary effects. In passing the CPPA, Congress attempted to regulate a subcategory of pornography not to suppress the expression of unpopular views but to prevent the secondary effects of child pornography. See Sen. Rpt. 104-358, at 2 (Aug. 27, 1996). If the CPPA targets child pornography, it is due to the effect of the pornography on innocent children, not the nature of the materials themselves, especially if that pornography contains computer-generated images of children. See id. Congress found that "child pornography is often used as part of a method of seducing other children into sexual activity," and that "child pornography is often used by

pedophiles and child sexual abusers to stimulate their own sexual appetites." Sen. Rpt. 104-358, at 2. Furthermore, the effect of visual depictions of child sexual activity on child molesters, pedophiles or innocent children "is the same whether the child pornography consists of photographic depictions of actual children or visual depictions . . . which are virtually indistinguishable . . . from photographic images of actual children." Id. Hence, in adopting the CPPA, Congress endeavored to protect "the physical and mental health, safety and well-being of our children" from the serious threat of child pornography. Id. at 7. Therefore, in serving to curb the secondary effects of child pornography on children, the CPPA represents a content-neutral regulation as a reasonable restriction on the time, place and manner of pornography without reference to its content.

Congress enacted the CPPA to combat the correlation between child pornography and the sexual exploitation of children. Id. at 2. The CPPA focuses on how child abusers use child pornography to seduce children and how child abusers use child pornography to learn sexually deviant behavior. Id. Moreover, the CPPA focuses on the secondary effect of actual physical harm to a child from the use of child pornography. Id. Congress's findings concern the secondary effects of child pornography rather than the direct impact of child pornography. Hence, the prevention of secondary effects renders the CPPA content-neutral.

Consequently, the Ninth Circuit erred by holding that the CPPA represented a content-based classification of speech aimed at curbing a particular category of expression. The district court found that Congress passed the CPPA in order to prevent the secondary effects of the child pornography industry, including the exploitation and degradation of children and the encouragement of pedophilia and molestation of children. The Free Speech Coalition, et al. v. Reno, et al., 198 F.3d 1083, 1090 (9th Cir. 1999). The failure of the Ninth Circuit to recognize

Congress's purpose in adopting the CPPA signifies a lack of concern towards the government's substantial interest in protecting children from the secondary effects of child pornography. Therefore, this Court should conclude that Congress passed the CPPA to prevent the secondary effects of child pornography.

B. As A Content-Neutral Regulation, The CPPA Is Narrowly Tailored To Advance Substantial Government Interests In Aiming To Safeguard The Physical And Psychological Well-Being Of Children.

Once a court deems a regulation content-neutral, the inquiry turns to whether the regulation is narrowly tailored to serve a significant government interest. Ward, 491 U.S. at 791. "A content neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." Turner Broadcasting System, Inc., et al. v. FCC, et al., 520 U.S. 180, 189 (1997). A statute will meet the narrowly tailored requirement if a substantial portion of the burden it imposes furthers the government's interest, even though a less intrusive alternative might also exist. American Library Assn., et al. v. Reno, 33 F.3d 78, 88 (D.C. Cir. 1994). Although the effects of a content-neutral regulation may be substantial, if they are incidental and largely unavoidable, they will pass constitutional muster. Id. at 87-88. This requirement is met so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. U.S. v. Albertini, 472 U.S. 675, 689 (1985). In addition, the mere assertion of possible self-censorship resulting from a statute fails to render an antiobscenity law unconstitutional. Fort Wayne Books, Inc. v. Ind., 489 U.S. 46, 60 (1989).

This Court upheld the constitutionality of an Ohio statute that prohibited the possession or viewing of child pornography because the utilization of child pornography in order to seduce

children constituted a secondary effect. Osborne v. Ohio, 495 U.S. 103, 111 (1990). Relying on the findings of the Attorney General's Commission on Pornography, this Court held that regulating child pornography represents a compelling government interest because "pedophiles use child pornography to seduce other children into sexual activity." Id. As in Osborne, the CPPA regulates child pornography to serve government interests. In adopting the CPPA, Congress found that "child pornography is often used as part of a method of seducing other children into sexual activity." Sen. Rpt. 104-358, at 2. Hence, the CPPA protects children from the sexual abuse and exploitation of children.

The government's interest in safeguarding the physical and psychological well-being of a minor constitutes a substantial government interest, even a compelling interest. New York v. Ferber, 458 U.S. 747, 756-57 (1982). This Court sustained legislation aimed at protecting the physical and emotional well-being of youth even when the law operated in the sensitive area of constitutionally protected rights. Id. at 757. In Ferber, this Court upheld the constitutionality of a New York criminal statute that prohibited persons from knowingly promoting and distributing materials depicting sexual performances by children under the age of sixteen without a showing of obscenity. Id. at 749. Secondly, this Court held that the distribution of photographs and films depicting sexual activity by juveniles intrinsically relates to the sexual abuse of children. Id. at 759. Thirdly, this Court held that to further prevent the production of child pornography the advertising and selling, effectively the market, of child pornography must be eradicated. Id. at 761. Finally, this Court held that the value of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*. Ferber, 458 U.S. at 762. These substantial interests justified New York's regulation of child pornography.

Here, the CPPA endorses the same justifications that this Court deemed dispositive in upholding the constitutionality of New York's regulation in Ferber. Congressional findings justify the CPPA's prohibitions of real and virtual child pornography with substantial government interests. Sen. Rpt. 104-358, at 2. Specifically, Congress found that child pornography, whether utilizing real or virtual children in sexually explicit conduct, is used to seduce other children to participate in sexually explicit activity. Id. Child pornography can convince a reluctant child to engage in sexual activity with an adult or to pose for sexually explicit photographs. Id. Also, sexually explicit conduct of real or virtual children stimulates and whets the sexual appetites of pedophiles and child abusers. Id. Child pornography desensitizes a viewer to the pathology of sexual abuse or exploitation of children. Id. Therefore, after weighing the evidence, Congress concluded that computer-generated children depicted in sexually explicit conduct posed just as viable a threat to the sexual exploitation of children as real children involved in sexually explicit conduct. Id. Thus, Congress determined that the physical and psychological well-being of children represents a substantial, indeed compelling, interest.

These substantial and even compelling interests illustrate that child pornography, whether utilizing virtual or real children, is intrinsically related to the sexual abuse of children. In a child pornography case, the Tenth Circuit concluded that the defendant "used his computer to expose his child victims to various sexual stimulants to lure them into sexual activities and pornography production." U.S. v. Reaves, 253 F.3d 1201, 1203 (10th Cir. 2001). Defendant showed his child victims sexually explicit imagery both before and after their participation in sexually explicit conduct fully expecting that such pornographic images would entice his victims to engage in this illicit sexual conduct with each other or with him. Reaves, 253 F.3d at 1203. In another child

pornography case, the defendant allowed his child victims access to his computer to view other children in sexual situations. U.S. v. Brown, 237 F.3d 625 (6th Cir. 2001). The Sixth Circuit concluded "in using the computer to desensitize his victims to deviant sexual activity, he was using it to solicit participation in that activity." Id. at 629. Hence, Congress enacted the CPPA to address the documented concern that child pornography intrinsically relates to the sexual abuse of children. Sen. Rpt. 104-358, at 2.

Furthermore, Congress enacted the CPPA to destroy the network and market of child pornography. Congress concluded that the elimination of child pornography necessarily includes the elimination of the distribution network for child pornography. Id. at 20. This Court held that states are entitled to greater leeway in the regulation of pornographic depictions of children because "the advertising and selling of child pornography provide[s] an economic motive for and [is] thus an integral part of the production of such materials." Ferber, 458 U.S. at 761. Hence, the market for child pornography plays a critical role in the vicious cycle of child sexual abuse and exploitation whether utilizing real or computer-generated children in sexually explicit conduct. The CPPA also serves to update federal law to keep pace with the technology of pornography. Sen. Rpt. 104-358, at 20. Pedophiles who possess pornographic depictions of actual children will go free from punishment by statutes prohibiting the possession of child pornography produced using actual children due to the government's inability to detect or prove the use of real children in the production of child pornography. Id. Thus, the enforcement of existing laws against the sexual exploitation of children requires the adoption of the CPPA.

Moreover, the CPPA represents a narrowly tailored statute serving significant governmental interests. The district court held that the CPPA burdens no more speech than necessary in order to protect children from the harms of child pornography. The Free Speech

Coalition, 198 F.3d at 1095-96. For example, the CPPA specifically defines sexually explicit conduct and child pornography. 18 U.S.C. § 2256 (2000). The affirmative defense allowed under the CPPA resolves any ambiguity regarding the phrases "appears to be" and "conveys the impression." 18 U.S.C. § 2252A(c) (2000). The affirmative defense limits the scope of the CPPA by removing from its range of criminal behavior the exact type of activity in which plaintiffs claim to engage. The Free Speech Coalition, 198 F.3d at 1086-87. Works that do not involve actual children and are not marketed or advertised as works featuring sexually explicit conduct by children lay beyond the scope of the CPPA. 18 U.S.C. § 2252A(c). Congress intended that the CPPA not apply to depictions produced using adults engaging in sexually explicit conduct even though they may appear to be a minor. Sen. Rpt. 104-358, at 21. Thus, the CPPA regulates the narrowest range of materials that might fall within its scope.

C. The CPPA's Regulation Of Child Pornography Reasonably Permits Alternative Avenues Of Communication.

A content-neutral regulation must not unreasonably limit alternative avenues of communication. City of Renton, et al. v. Playtime Theatres, Inc., et al., 475 U.S. 41, 50 (1986). In order to permit adequate avenues of expression, a regulation must permit alternative methods of disseminating or possessing the material in question. U.S. v. Hilton, 167 F.3d 61, 69 (1st Cir. 1999). Here, the CPPA permits alternative channels of communication. Although the CPPA prohibits the possession of child pornography utilizing real or virtual children, the affirmative defense allowed under the CPPA leaves open acceptable alternatives. 18 U.S.C. § 2252A(c). Pornography that utilizes actual adults that appear to be minors escapes the reach of the CPPA as long as the material was not marketed as child pornography. Id. Given the *de minimis* value of child pornography, adult pornography constitutes a reasonable alternative avenue of communication as long as not obscene. Ferber, 458 U.S. at 762.

D. The Court Of Appeals For The Ninth Circuit Erred By Holding That Compelling Government Interests Exist Only When Child Pornography Contains Images Of Actual Children.

The Court of Appeals for the Ninth Circuit erred by failing to give legitimate recognition to the compelling governmental interests that justify the CPPA. The Ninth Circuit held under the rationale of Ferber that Congress's compelling interest in regulating child pornography is narrowly limited to sexually explicit materials containing visual images of actual children. The Free Speech Coalition, 198 F.3d at 1092. "Ferber considered the possibility of simulations of sexually explicit acts involving non-recognizable minors and implicitly found them to be constitutionally protected." Id. This is an incorrect conclusion. Preventing the sexual abuse and exploitation of real children is not the sole justification for Congress's criminalization of child pornography.

Ferber indicates that the government's interest in regulating child pornography is much broader than as the Ninth Circuit held. In Ferber, this Court held that "the prevention of the sexual exploitation and abuse of children constitutes a government objective of surpassing importance." 458 U.S. at 757. Ferber did nothing more than place child pornography on the same level of First Amendment protection as obscene adult pornography, meaning that its production and distribution could be proscribed. Osborne, 495 U.S. at 140 (Brennan, J., dissenting). A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Prince v. Massachusetts, 321 U.S. 158, 168 (1944). Furthermore, this Court never explicitly addressed the issue regarding computer-generated children. In fact, at the time of Ferber, the technology to produce visual depictions of child sexual activity indistinguishable from photographs of actual children engaging in sexual activity did not exist in 1982. Sen. Rpt. 104-358, at 21. This Court only addressed real children

involved in child pornography because the respondent sold two films to an undercover police officer depicting actual boys masturbating. Ferber, 458 U.S. at 752. The Ninth Circuit misplaced the majority's reliance on the dicta in Ferber hinting at the statute's limitation to real children. This Court wrote that live performances including films, photographs and other visual reproductions retained First Amendment protection to prevent works such as sculptures, paintings, drawings and cartoons depicting young persons in sexually explicit conduct from coming within the scope of the statute. Id. at 765. Hence, this Court made no implicit or explicit holdings regarding the regulation of virtual child pornography.

This Court's reasoning in Osborne and Ferber justified child pornography regulation in order to protect children from sexual abuse and exploitation. Osborne, 495 U.S. at 109; Ferber, 458 U.S. at 757. The CPPA justifiably regulates child pornography in order to protect children from sexual abuse and exploitation. The CPPA aims to prevent the sexual exploitation and seduction of real children. Sen. Rpt. 104-358, at 2. To a minor or child abuser, it is irrelevant whether the minor is viewing actual children or computer-generated children participating in sexually explicit conduct. Id. The danger to actual children who are seduced and molested with the aid of child pornography is just as great whether utilizing actual or virtual children.

In addition, the Ninth Circuit stands alone in holding the CPPA unconstitutional against decisions of the First, Fourth, Fifth and Eleventh Circuits. See U.S. v. Fox, 248 F.3d 394, 404 (5th Cir. 2001); U.S. v. Mento, 231 F.3d 912, 915 (4th Cir. 2000); Hilton, 167 F.3d at 65; U.S. v. Acheson, 195 F.3d 645, 648 (11th Cir. 1999). The First Circuit held that the CPPA represents "a logical and permissible extension of the rationales in Ferber and Osborne to allow the regulation of sexual materials that appear to be of children but did not, in fact, involve the use of live children in their production." Hilton, 167 F.3d at 73. The Fourth Circuit held that the

government's interest in stamping out child pornography and denying child abusers access extends beyond the protection of the children actually involved in making the pornography. Mento, 231 F.3d at 920. "The government instead aspires to shield all children from sexual exploitation resulting from child pornography." Id.

E. The Court Of Appeals For The Ninth Circuit Failed To Give Proper Deference To Congressional Findings.

The Ninth Circuit ignored factual studies that provided evidence for Congress's findings. In fact, the Ninth Circuit independently concluded that factual studies do not yet exist establishing a link between computer-generated child pornography and the subsequent sexual abuse of children. The Free Speech Coalition, 198 F.3d at 1093. Instead, the Ninth Circuit relied on a single law review article rather than on the well-researched findings of Congress. In reviewing the constitutionality of a statute, courts must accord substantial deference to the judgments of Congress. Turner Broadcasting System, Inc., et al. v. FCC, et al., 520 U.S. 180, 195 (1997). A court's sole obligation is to assure that, in formulating its judgments, Congress drew reasonable inferences based on substantial evidence. Id. A court owes Congress's findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions. Id. In addition, courts owe Congress's findings an additional measure of deference out of respect for its authority to exercise the legislative power. Id. at 196. Even when the resulting regulation touches on First Amendment concerns, a court must give considerable deference in examining the evidence to Congress's findings and conclusions. Id. at 199. A fundamental principle of legislation holds that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it. Id. at 212. Furthermore, the possibility of drawing inconsistent conclusions from the evidence

does not prevent a finding from being supported by substantial evidence. American Textile Mftrs. Institute, Inc. v. Donovan, 452 U.S. 490, 523 (1981).

Consequently, the Ninth Circuit failed to determine whether Congress drew reasonable inferences based on substantial evidence. Ignoring Congress's findings altogether, the Ninth Circuit replaced Congress's judgments with its own. In Turner, this Court held that a court is not to reweigh the evidence de novo or to replace Congress's factual predictions with its own. 520 U.S. at 210. In Ferber, this Court refused to second-guess the legislative findings regarding the secondary effects of child pornography. 458 U.S. at 758. Here, substantial evidence reasonably supports Congress's findings. Numerous experts and professionals addressed Congress regarding the issue of child pornography: Mrs. Dee Jepsen, Dr. Victor Cline, Dr. Shirley O'Brien, Deputy Assistant Attorney General Di Gregory, Mr. Taylor. Sen. Rpt. 104-358, at 13-18. "The best evidence to date suggests that most or all sexual deviations are learned behavior" where child molesters and pedophiles use child pornography as a training manual. Id. at 13. Dr. O'Brien found a direct relationship existing between pornographic literature and the sexual molestation of young children because viewing child pornography desensitizes the child and molester. Id. Dr. Cline testified that computer-generated child pornography creates custom-tailored pornography which heightens the material's effect on viewers and subsequently increases the threat posed to children. Id. at 16. In 1996, Dr. Cline wrote that to sexual predators, the effect is the same whether the child pornography consists of photographic depictions of actual children or depictions produced wholly or in part by computer. Id. at 17. From this expert testimony, Congress reasonably concluded that child pornography, whether utilizing actual or virtual children, poses a significant threat against the safety of children.

II. EVEN IF THE CHILD PORNOGRAPHY PREVENTION ACT OF 1996 IS CONTENT-BASED, COMPELLING GOVERNMENT INTERESTS JUSTIFY THE CONSTITUTIONALITY OF THE ACT UNDER A STANDARD OF STRICT SCRUTINY.

"Any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it." Boos v. Barry, 485 U.S. 312, 335-36 (1988). If a regulation on speech expressly aims to curb a particular category of expression by singling out that type of expression based on its content, then that regulation is content-based. Hilton, 167 F.3d at 68. Blanket suppression of an entire category of speech represents, by its very nature, a content-discriminating act. Id. Even if this Court holds that the CPPA is content-based, however, the CPPA still passes constitutional muster because compelling government interests justify its restrictions on child pornography.

A. Under A Standard Of Strict Scrutiny, The CPPA Advances Compelling Government Interests.

A content-based restriction on speech remains constitutional only if the regulation represents a precisely drawn means of serving a compelling governmental interest. Consolidated Edison Co. of N.Y., Inc. v. PSC of N.Y., 447 U.S. 530, 540 (1980). For a content-based statute to be constitutional, therefore, one or more compelling state interests must justify the enactment of the statute. Hilton, 167 F.3d at 68. A content-based statute must pass a standard of strict scrutiny in order to be constitutional. Boos, 485 U.S. at 321. "It is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests." Ferber, 458 U.S. at 763. Moreover, the same governmental interests that justify the constitutionality of a content-based statute constitute the same

governmental interests that justify the constitutionality of a content-neutral statute. Hence, the CPPA advances compelling government interests that justify its regulation of child pornography.

The First, Fourth, Fifth and Eleventh Circuits correctly held that the CPPA advances compelling government interests. In Hilton, the First Circuit held that under the reasoning of Osborne "stamping out child pornography" and "denying pedophiles and would be child abusers access to child pornography" constitute compelling government interests. 167 F.3d at 70. Moreover, "considerations beyond preventing the direct abuse of actual children can qualify as compelling government objectives where child pornography is concerned." Id. The government's interest in safeguarding the welfare of children against virtual child pornography is compelling. Id. at 73. The First Circuit recognized that virtual pornography can be bought, sold or traded like real child pornography and can be used just as effectively in enticing children as real child pornography. Id. In Mento, the Fourth Circuit held that the CPPA "aspires to shield all children from sexual exploitation resulting from child pornography, and that interest is indeed compelling." 231 F.3d at 920. The Fourth Circuit recognized that the connection between virtual child pornography and the sexual abuse of children represents just as powerful an interest as the causal link that justifies the utter prohibition of pornographic images involving actual children. Id.

The Fifth Circuit held that Ferber and Osborne, decided long before the specter of virtual child pornography appeared, in no way limited the government's interests in the area of child pornography to the prevention of only the harm suffered by the actual children who participate in the production of pornography. Fox, 248 F.3d at 402. The Eleventh Circuit upheld the constitutionality of the CPPA because the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. Acheson, 195 F.3d at 650. The

Eleventh Circuit held that "defining child pornography in a manner which captures images that 'appear to be' minors engaged in sexually explicit activity serves the two goals of the Act which are the elimination of child pornography and the protection of children from sexual exploitation." Acheson, 195 F.3d at 649. Thus, the First, Fourth, Fifth and Eleventh Circuits held that the CPPA advances compelling govern.nent interests in aiming to safeguard the physical and psychological well-being of children.

This Court held that the government's interest in safeguarding the physical and psychological well-being of children constitutes a compelling interest. Ferber, 458 U.S. at 756-57. In Ferber, this Court also held that regulating the distribution, advertising and selling of photographs and films depicting sexual activity by juveniles constitutes a compelling interest in protecting the well-being of children. Id. at 759, 761. In Osborne, this Court held that prohibiting the mere possession and viewing of child pornography constitutes a compelling interest in protecting the well-being of children against the use of child pornography to seduce children. 495 U.S. 103, 111 (1990). Hence, the government's interest in driving child pornography from the market through aggressive anti-trafficking laws and prohibiting private possession and personal viewing remains justified. Id. Congress's power to remedy only the abuse of children during the process used to produce traditional forms of child pornography extends beyond such a limitation. Thus, the CPPA's prohibition of possession and viewing of virtual child pornography constitutes a compelling interest in protecting the well-being of children.

The CPPA aims to protect the well-being of children against sexual exploitation and abuse from pedophiles and child abusers. Logically, the compelling interest of protecting children from sexual exploitation and abuse includes preventing the use of virtual child

pornography to stimulate the sexual appetites of pedophiles and child abusers. Sen. Rpt. 104-358, at 3. This interest includes preventing the seduction or coercion of children into sexual activity from the use of virtual child pornography. Hilton, 167 F.3d at 73. This interest includes destroying the network and market for virtual and real child pornography. Id. at 70. This interest includes solving the problem of prosecution in proving beyond a reasonable doubt that a pornographic image utilized a real child. Id. at 73. Congress found that these compelling government interests justify the CPPA's prohibition on pornographic images that appear to be minors and convey the impression of minors. Sen. Rpt. 104-358, at 2. Therefore, the CPPA advances compelling government interests that justify its regulation of child pornography.

B. The CPPA Is Narrowly Tailored In The Least Restrictive Means Possible To Advance Compelling Government Interests.

In order to pass constitutional muster, a content-based regulation must be narrowly tailored in advancing compelling government interests. City of Renton, et al. v. Playtime Theatres, Inc., et al., 475 U.S. 41, 48 (1986). Congress may regulate protected speech to promote compelling governmental interests so long as it selects the least restrictive means to further the articulated interest. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). Here, the provisions of the CPPA are narrowly tailored. Congress's statements clearly limit the "appear to be" and "conveys the impression" language of the CPPA to visual depictions virtually indistinguishable from photographs of actual children engaging in sexually explicit conduct. Sen. Rpt. 104-358, at 2. This intent excludes drawings, cartoons, sculptures and paintings depicting children in sexually explicit conduct from the reach of the CPPA. Furthermore, the CPPA specifically defines sexually explicit conduct and child pornography. 18 U.S.C. § 2256 (2000). The CPPA's affirmative defense further limits the reach of the CPPA to child pornography that utilizes real or virtual children in sexually explicit conduct. 18 U.S.C. §

2252A(c) (2000). These regulations represent the least restrictive means possible of advancing the government's compelling interest in protecting children from sexual exploitation and abuse. Thus, the CPPA aims to prohibit visual depictions of children engaging in sexually explicit conduct that is virtually indistinguishable from actual children engaging in sexually explicit conduct. Sen. Rpt. 104-358, at 2.

III. THE CPPA IS NOT OVERBROAD AND WILL NOT HAVE A CHILLING EFFECT BECAUSE OF THE STATUTE'S LEGITIMATE SWEEP TO SAFEGUARD THE PHYSICAL AND PSYCHOLOGICAL WELL-BEING OF CHILDREN.

The conclusion that the CPPA of 1996 is a content-neutral statute, aimed at preventing the secondary effects emanating from child pornography, does not end the inquiry into the CPPA's constitutionality. "An otherwise constitutional statute may nonetheless violate the First Amendment if it is 'overbroad' i.e., if it 'criminalizes an intolerable range of constitutionally protected conduct.'" Osborne, 495 U.S. at 112. However, the CPPA does not criminalize an intolerable range of protected speech. The CPPA merely extends the existing prohibitions on "real" child pornography to a narrow class of computer-generated pictures that are easily mistaken for real photographs of real children. The Free Speech Coalition, et al. v. Reno, et al., 198 F.3d 1083, 1102 (9th Cir. 1999).

A. The Statute's Plainly Legitimate Sweep To Stop The Child Pornography Trade And Subsequent Child Abuse Overrides Any Overbreadth Problems.

The overbreadth doctrine should only be used, "as a last resort, and we must construe the statute, if at all possible, to avoid constitutional problems." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). In this case, Oklahoma state employees sought a declaration that a state statute regulating political activity by state employees, was invalid. Id. at 601. The Court held that the statute was not overbroad, and therefore not unconstitutional, stating that,

> [W]e believe that the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that section 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations and to which its sanctions, assertedly, may not be applied.

Broadrick, 413 U.S. at 618.

The Court concluded that the statute should not be discarded, "in toto because some persons' arguably protected conduct may or may not be caught or chilled by the statute." Id. at 615. The Court, therefore, held that the statute was constitutional. Id.

Likewise, the First, Fourth, Fifth and Eleventh Circuits held the CPPA to be constitutional, because of the government's interests in deterring the direct abuse of children and destroying the illicit child porn trade, was deemed to be legitimate in relation to its overbreadth. Hilton, 167 F.3d at 72-73; Mento, 231 F.3d at 921-22; Fox, 248 F.3d at 404-06; Acheson, 195 F.3d at 650-52. These courts held that the CPPA does not infringe upon or have the potential to infringe upon constitutionally protected speech. Hilton, 167 F.3d at 71. For example, in Hilton, the court recognized that the "appears to be" and "conveys the impression" language expanded the scope of the CPPA to a point where it may capture constitutionally protected speech, rendering the statute invalid and chilling protected speech. Id. However, this court and other circuit courts held that even though the statute on its face might pose constitutional difficulties, Congress's statements provide, "a precise and limited understanding of the 'appears to be' language." Id. The court in Hilton ruled that, "'[w]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" Id. (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

Therefore, the First Circuit and the other courts of appeal looked to the congressional record to determine if the language used in the statute targeted a narrow class of images. Hilton, 167 F.3d at 71. The legislative record aims at a narrow range of images, "which are virtually indistinguishable to unsuspecting viewers from un-retouched photographs of actual children engaging in identical sexual conduct." Sen. Rpt. 104-358, at 7. The "appears to be" language, "applies to the same type of photographic images already prohibited, but which does not require the use of an actual minor in its production." Sen. Rpt. 104-358 at 21. The prohibition of child pornography was extended from, "photographic depictions of actual minors engaging in sexually explicit conduct to the identical type of depiction, one which is virtually indistinguishable from the banned photographic depiction." Id. The Senate Reports narrow the statute so that the CPPA is constitutional.

B. The CPPA Is Sufficiently Related To The Substantial, Indeed Compelling, Government Interest In Safeguarding Children.

However, the Ninth Circuit also held that the, "CPPA is insufficiently related to the interest in prohibiting pornography actually involving minors to justify its infringement on protected speech." The court, however, relies on a restrictive reading of Ferber, 458 U.S. 747. The Court in Ferber upheld a New York state statute that prohibited the distribution of child pornography involving real children in sexually explicit conduct. Id. The Court further ruled that, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Id. at 757. In a subsequent case, the Court agreed that the goal of child pornography statutes should be "safeguarding the physical and psychological well-being of children," and that the extension of this goal should be the termination of the child pornography market. Osborne, 495 U.S. 103 at 109. The Court in Ferber and Osborne, therefore, agreed that the ultimate goal was the safeguarding of children.

Recently, however, the government's goal to safeguard children has been threatened due to advances and availability in computer technology. Four circuit courts of appeal permitted the extension of Ferber and Osborne's reasoning to allow the CPPA to regulate pornography that contains images that appear to be children or convey the impression that a child was used in production. Hilton, 167 F.3d at 73; Mento 231 F.3d at 921; Acheson 195 F.3d at 651; Fox, 248 F.3d at 403-404. As the Senate Reports confirm, these "virtual" depictions can be readily used to further the child pornography trade and facilitate the seduction and abuse of children. Sen. Rpt. 104-358, at 8-9. The legislative history also reports that technology has improved and increased so much that it may be impossible to determine whether a real child was used in the creation of the images. Id. at 17. The efforts to eradicate the child pornography market would be frustrated if the statute did not extend to images that appear to be or convey the impression of children. If the government were not allowed to prosecute images that are virtually indistinguishable from real images, then the alleged pornographer would have a built-in defense that the government cannot prove that the image circulating is that of a real individual. Technology will hinder the government from doing its job and allow pornographers to go free.

Therefore, the government's interest in addressing these forms of virtual child pornography is no less powerful than when actual children are harmed during production. The ultimate goal of safeguarding children, presented in the Supreme Court cases of Ferber and Osborne, is also at the heart of the CPPA of 1996.

C. It Is Unlikely That Educational, Medical, Or Artistic Work Would Be Within The Reach Of The CPPA, But Even If Some Protected Speech Were Captured These Images Could Be Reviewed On A Case-By-Case Basis.

It is also not problematic that the CPPA might reach a small amount of protected speech. 167 F.3d at 71. The Court in Ferber, for example, rejected an overbreadth challenge to a New

York state statute that prohibited the distribution of child pornography involving real children in sexually explicit conduct. Ferber, 458 U.S. at 773. The Court held that the statute was, "directed at the hard core of child pornography" and it did not view the possibility that some protected speech might be covered as a reason to hold the statute invalid. Id. The Court explained that only a tiny fraction of educational, medical, or artistic work would be within the statute's reach and that if overbreadth did exist in these situations that it should be cured by a "case-by-case analysis of the fact situations to which its sanctions may not be applied." Ferber, 458 U.S. at 773-74. The Court in Ferber went on to say that, "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looks younger could be utilized." Id. at 763. Thus, the Court would have to review the use of the images for literary, artistic or scientific worth on a case-by-case basis.

The reasoning applied in Ferber can be applied to the CPPA of 1996 and was applied by four circuit courts. Like the statute in Ferber, the CPPA is aimed at hard core pornography that includes depictions of sexual intercourse, masturbation, lascivious exhibition of the genitals, etc. 18 U.S.C. § 2256(2) (2000). The CPPA does not apply to the "innocuous depiction of a minor". Sen. Rpt. 104-358 at 20. In addition, the CPPA applies to visual materials but does not cover drawings, cartoons, sculptures and paintings of youthful looking persons in sexual poses, because these images are not virtually indistinguishable from an image of an actual minor. However, if an adult model were needed to simulate the sexual behavior of a child for a literary, artistic or scientific reason then the social value of these works must be weighed against the government's interest in protecting children. Ferber, 458 U.S. at 763. The social value of these works would probably be far from the hardest core of pornography. As Justice Brennan stated in his concurrence in Ferber, the government's interest in protecting children "is likely to be far less

compelling" when "the depiction is a serious contribution to art or science." Ferber, 458 U.S. at 776. Thus, as in Ferber, any overbreadth that may exist can be cured on a case-by-case analysis.

Finally, the court in Hilton was also concerned that the statute would cover a substantial amount of adult-oriented material because the phrase "appears to be a minor" criminalizes possession of adult pornography created with models over the age of majority who look youthful. 167 F.3d 61 at 71. However, as the court in Hilton stated, the main flaw in the appellant's argument was its focus on teenagers that are just under the age of majority. The court was satisfied, by examining the legislative history of the statute, that the majority of prosecutions would involve images of pre-pubescent children or persons who otherwise clearly appear to be under the age of eighteen. Id. at 73.

The Legislature has determined that the purveyors of child pornography usually cater to pedophiles, who by definition have a taste for pre-pubertal children. Sen. Rpt. 104-358, at 21. Adult material would not fall into this category. The court in Hilton finally determined that while the prosecution of individuals that sell or possess images of young-looking adults might occur, it is unlikely that it would be a substantial portion of prosecutions. The defense is consistent with the congressional aim to protect children and not target adult material. Id. at 21.

D. The Affirmative Defense And Scienter Requirement Further Lessen Any Overbreadth Concerns.

The prosecution of individuals, who sell or possess images of youthful looking adults and any potential overbreadth problems are further lessened by other provisions provided for in the CPPA. First, the CPPA offers an affirmative defense for the production of explicit material made with a person of suitable age. 18 U.S.C. § 2252A(c) (2000). If an actual person or persons were engaging in sexually explicit conduct, then the defense provides:

> [I]f each such person was an adult at the time the material was produced; and the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C. § 2252A(c) (2000).

The affirmative defense goes hand in hand with Congress's view that the CPPA does not and is not intended to apply to images that use adults engaging in sexually explicit conduct. Sen. Rpt. 104-358, at 21.

However, this defense does not extend to possessors of child pornography. In cases of possession, the government must prove that the defendant knowingly possessed child pornography. This scienter requirement, necessitates a showing that the individual purposefully acquired or distributed the material, but that the individual did so believing that the material was sexually explicit in nature and that it depicted a person who appeared to him to be (or that he anticipated would be) under 18 years of age. Hilton, 167 F.3d 61 at 75. The scienter requirement thus, "limits the scope of the [statute] because the desire for prosecutorial efficiency dictates the vast majority of prosecutions...would involve images of prepubescent children or persons who otherwise clearly appear to be under the age of 18." Acheson, 195 F.3d at 651-652. Furthermore, the court in Hilton stated that the danger of persons being convicted for possessing sexually explicit material of adults that look youthful is overstated in light of Congress's determination that purveyors of child pornography "usually cater to pedophiles, who by definition have a predilection for prepubescent children. 167 F.3d at 73-74. The defense is consistent with Congress's aim that the law, "does not, and is not intended to, apply to a depiction produced using adults engaging in sexually explicit conduct, even where a depicted individual may appear to be a minor." Sen. Rpt. 104-358, at 21.

IV. THE CPPA IS NOT VOID FOR VAGUENESS BECAUSE IT PROVIDES ADEQUATE NOTICE AND OBJECTIVE ENFORCEMENT

The CPPA is not void for vagueness because it meets the two pronged test put forth by the United States Supreme Court decision in Kolender v. Lawson, 461 U.S. 352, 357 (1983). A statute is void for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement." Kolender, 461 U.S. 357. In this case, Lawson was arrested and convicted for violating a California statute requiring persons who loiter or wander the streets to provide a credible and reliable identification and to account for their presence when requested by police. Id. at 353. The Supreme Court held that the statute was unconstitutionally vague because if failed to clarify what was contemplated by the requirement that a suspect have credible and reliable identification. Id. The Court agreed that the statute does not require "impossible standards" of clarity. Id. at 358. The Court concluded that the statute did not have standards for determining what a suspect has to do in order to satisfy these requirements, leaving it up to the police to decide whether the suspect has satisfied the statute. Id. at 360. Thus, the loitering statute did not provide notice and was held to be void for vagueness

A. The CPPA Provides Adequate Notice When Examining The Purpose And Context Surrounding The CPPA.

Certainly, a statute must provide adequate notice as was held in the Kolender case. However, as the Court in Kolender also ruled, the statute does not require "impossible standards" of clarity. Another Supreme Court case concurred with this principle. This Court concluded that a state anti-noise ordinance was not impermissibly vague, because statutes are, "[c]ondemned to the use of words, we can never expect mathematical certainty from our

language." Grayned v. City of Rockford, 408 U.S. 104, 109 (1972). The Court duly noted that terms in the ordinance like "tend to disturb" or "adjacent" could appear vague. Id. at 110. However, because the purpose of the ordinance, "for the protection of schools", and its context, "school grounds and activities", the Court concluded that the ordinance was clear. Id. at 112. The Court also recognized that there might be situations that arise questioning the meaning of the terms in the statute. "'It will always be true that the fertile legal imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question.'" Id. at 110 (quoting American Communications Assn. v. Douds, 339 U.S. 382, 412 (1950)). But, the Court held that a vagueness challenge cannot succeed by merely showing the possibility of an impermissible application. Id. at 114. Thus, although there might be uncertainties when examining the statute and situations that may arise to cause uncertainties, vagueness problems will disappear if meaning can be tied to the purpose and context in which the statute operates.

Such is the case in the CPPA that any interested individual who believes certain terms to be vague will know what is prohibited conduct by examining the purpose and context of the statute. First, the CPPA's "appears to be" and "conveys the impression" provisions satisfy the standard of notice even though they appear to be vague. By examining the purpose and context of the legislative history, it is clear that both provisions apply only to, "material that is virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. § 2251 (2000).

Likewise, the Eleventh Circuit in Acheson concluded that a reasonable person is on notice that possessing images appearing to be children engaged in sexually explicit conduct is illegal. 195 F.3d at 652. Furthermore, terms such as minor and sexually explicit activity are precisely defined in the statute. The statute also categorizes conduct that is banned: pictures of

actual minors, altered pictures of actual minors, pictures appearing to be minors and pictures that are represented as minors. Acheson, 195 F.3d at 652. The statute, therefore, is not understood to criminalize any sexual explicit depictions that are not virtually indistinguishable from photographs of child pornography. Even if someone conjured up a hypothetical situation that did infringe upon protected adult pornography, this Court has stated that the vagueness challenge cannot succeed by showing the possibility of an impermissible application. The purpose and context of the statute and the definitional language of the statute therefore give an ordinary person notice.

B. The CPPA Is Objective So That Enforcement Of The Statute Will Not Be Arbitrary.

The language "appears to be" and "conveys the impression" is objective so that law enforcement can enforce the statute fairly. The First, Fourth, Fifth and Eleventh Circuits have all held that the key language of the statute is not subjective but objective and is therefore not subject to discriminatory enforcement. As stated above, in the section concerning overbreadth, the legislative history shows that "appears to be" was intended to cover images, "which are virtually indistinguishable to unsuspecting viewers from un-retouched photographs of actual children engaging in identical sexual conduct." Sen. Rpt. 104-358, at 7. This objective standard, coupled with provisions of enforcement, allow the CPPA to be enforced in an objective manner.

It is well settled law that objective determinations based on a person's appearance or actions are routinely accepted in court. Miller v. California, 413 U.S. 15 (1972). In the Miller v. California case, the Supreme Court was deciding whether the state could regulate the work of the defendant who was convicted of mailing unsolicited sexually explicit material. Id. at 15. The Court held that the state could regulate work, where taken as a whole, "appeals to the prurient

interest in sex . . . ." Miller, 413 U.S. at 24. The Court further held that in order to determine if a work appeals to prurient interest that the guidelines would be for an average person to examine the material applying contemporary community standards. Id. The Court concluded that it was acceptable to use such a standard based on appearance and that this was an objective determination. Id.

As in the state statute in Miller, a trier of fact under the CPPA must objectively decide, based on the totality of the circumstances, whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of eighteen engaged in sexual activity. Hilton, 167 F.3d at 75. The jury must then determine, based on the evidence, whether a reasonable viewer would consider the depiction to be of an actual minor. The jury must also decide whether the image was marketed so as to "convey the impression" that the image was made with minors. Id. Both of these jury determinations are based on an objective reasonable person standard that can be handled in a variety of ways.

For example, the trier of fact may simply examine the physical characteristics of the person to determine age. Id. at 76. If, however, the minor has already reached puberty, then perhaps an expert witness may testify as to the physical development of the depicted person. Id. Evidence may also be introduced that explores how the disk, file or video was labeled or marked by the creator, distributor or possessor. Id. The Fifth Circuit, for example, found that it is a custom of the child pornography trade to name a computer file with a name like "Falcon 10", and that the number refers to the age of the person depicted in the file, which might aid in determining the age of the minors. U.S. v. Fox, 248 F.3d 348, 407 (5th Cir. 2001). Finally, the Fourth Circuit held that the manner in which the pornography was created, promoted or distributed is determinative of status as child pornography. Mento, 231 F.3d 912, 922 (4th Cir.

2000). If the presentation were such that it, "conveyed the impression" that the image was of one or more minors, that would provide an independent basis for conviction. Mento, 231 F.3d at 922. But, as the Mento court also noted, "it would be the jury's responsibility to ensure that a reasonable person would understand the specific impression sought to be conveyed." Id. As the court in Hilton stated, "[w]hile this list is hardly exhaustive, it gives a flavor of the ways in which a depicted person's apparent age might be objectively proven." Id.

A further safeguard against arbitrary legal enforcement is that the prosecution must establish the element of scienter to get a conviction. U.S. v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994). In the X-Citement case, the Supreme Court held that the scienter term "knowingly" as used in the Protection of Children Against Sexual Exploitation Act, applied to elements of crime concerning minority of performers and sexually explicit nature of material. Id. at 64. The Court admitted that it was not clear from the statute that the scienter requirement applied to both the minority of the performers and the nature of the material. Id. at 78. However, the Court turned to Congressional reports that indicated that the scienter requirement also extends to the age of performers. Id. The Court concluded that in order to erase serious constitutional doubts about the statute that the scienter requirement would have to apply to the age of performers. Id.

The reasoning in X-Citement Video, to extend the scienter requirement to both the age of the performers and the sexually explicit nature of the material, is the way in which the CPPA must also be interpreted to erase any constitutional doubts. 18 U.S.C. § 2252A(a)(5)(B) (2000) of the CPPA establishes that the government must prove beyond a reasonable doubt that an "individual" knowingly possessed the child pornography. 18 U.S.C. § 2252A(a)(2) applies only to a person who knowingly receives or distributes child pornography. As the statute in X-

Citement Video, the CPPA likewise provides that the government must prove not only that an individual purposefully acquired or distributed the material, but that he did so believing that the material was sexually explicit in nature and that it depicted a person who appeared to him to be under eighteen years of age. Hilton, 167 F.3d at 75. Therefore, a defendant who honestly believes that an individual depicted in the image appeared to be eighteen years old or older, or can prove that the image was created with a youthful-looking adult, must be acquitted, unless the image was presented or marketed as if it contained a real minor. Hilton, 167 F.3d at 75. The scienter requirement is therefore another protection against arbitrary enforcement of the CPPA.

Finally, the affirmative defense is yet another added measure against arbitrary enforcement. The affirmative defense is given if the person depicted actually was an adult at the time the image was created. The fact that the person in the image was eighteen years of age, will likely lead to a dismissal of the charge. The affirmative defense is provided for those sellers, producers and distributors who allegedly promoted, advertised, presented, described or distributed their material to convey the impression that it contained visual depictions of child pornography. 18 U.S.C. § 2252(A)(c). Therefore, this defense does not extend to possessors unless the possessor has less than three images that were promptly destroyed or reported the images to law enforcement. 18 U.S.C. § 2252A(d). However, the government still has to prove the scienter requirement about what an individual believed to be the age of the depicted person if they possess child pornography. Thus, if the defendant can show that he honestly believed that the person depicted was above 18 years of age, or can prove the person was over the age of majority than there must be an acquittal, unless the image was presented or marketed as child pornography.

V. CHILD PORNOGRAPHY IS A FORM OF SPEECH THAT SHOULD NOT BE PROTECTED BY THE FIRST AMENDMENT.

While the First Amendment provides broad protection for free speech rights, the Supreme Court has recognized that some types of speech are wholly without First Amendment protection. In Chaplinsky v. New Hampshire, the Court laid the foundation for the excision of obscenity from the protection of the First Amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefits that may be derived from them is clearly outweighed by the social interest in order and morality.

315 U.S. 568, 571 (1942).

The First Amendment to the Constitution, therefore, does not protect all speech. Speech must have some socially redeeming value to warrant Constitutional protection. Obscenity, fighting words, and child pornography are all historical examples of speech that this Court has declined to provide such protection. Child pornography has no social value, whether produced with real children or otherwise.

The Court held that child pornography is another category of speech outside the ambit of First Amendment protection. New York v. Ferber, 458 U.S. 747 (1982). The Court articulated the state interest in protecting children as a policy rationale for denying First Amendment protection to child pornography. Id. at 749. In Ferber, the Supreme Court intimated that child pornography is worse than "mere" obscenity. Id. The Court decided that a state should be granted more leeway to prevent the harmful effects of child pornography than it has in cases of adult pornography. Id. Essentially, although the Court applied a strict scrutiny test, it decided that the compelling interest in protecting children would almost always outweigh First

Amendment interests, thereby justifying a categorical denial of First Amendment protection to child pornography in virtually every case. Ferber, 458 U.S. at 749.

The Senate Reports for the CPPA extends the Ferber rationale to computer-generated images. Sen. Rpt. 104-358, at 19. These "virtual" images do not deserve First Amendment protection because, "the State's compelling interest in protecting children is directly advanced by prohibiting the possession or distribution of such material, for many of the same reasons applicable to the child pornographic material at issue in Ferber." Sen. Rpt. 104-358, at 19. These objectives for eradicating "real" child pornography are one in the same for "virtual" child pornography. As stated before in Ferber, the state has a compelling interest to safeguard the physical and psychological well-being of children. Id. at 761. Children will be protected when there is a halt to the distribution of images depicting children in sexual activity because it is related to the sexual abuse of children. Id. at 762. Whether the images are real or virtual does not matter to pedophiles, who will use the images to stimulate and whet their appetites. Sen. Rpt. 104-358, at 19. Computer-generated images, which appear to be a minor or convey the impression that minors are depicted in sexually explicit conduct, are just as dangerous to the well-being of children as material produced using actual children. Id.

Thus, the production of this obscene speech causes harm to real children directly, if they are part of the production process, or indirectly because pedophiles use such material to whet their appetites and to seduce children to ultimately abuse them. "Virtual" child pornography should not be given more protection than "real" child pornography. In the final analysis, the visual depictions of child pornography, as defined under the CPPA, are without the protection of the First Amendment and are the appropriate target of government regulation to eradicate this market.

CONCLUSION

The CPPA is a content-neutral statute that is not overbroad or void for vagueness. The CPPA is content-neutral because it prevents the secondary effects of the child pornography industry, including the exploitation and degradation of children and the encouragement of pedophilia and molestation of children. However, even if the CPPA is considered to be content based, four circuit courts of appeal have correctly held that it is narrowly tailored to serve compelling government interests. Furthermore, the CPPA is not overbroad because it does not reach depictions that are not at the hard core of child pornography. However, in the case that the statute does reach a tiny fraction of educational, medical, artistic or other protected speech the overbreadth may be cured on a case-by-case analysis. Finally, the CPPA is not void for vagueness because persons of ordinary intelligence can distinguish whether a depiction is virtually indistinguishable from a photo of a real child engaging in sexually explicit activity. Secondly, the statute will not be arbitrarily enforced because it is based on objective standards.

For the foregoing reasons, Petitioner respectfully requests that this Court REVERSE the judgment of the United States Court of Appeals for the Ninth Circuit and hold that the CPPA passes constitutional muster. Specifically, sections 2256(8)(B) and 2256(8)(D) should not be omitted from the statute.

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Respectfully submitted,

Counsels for Petitioner